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Administration of justice at the United Nations

Letter dated 26 October 2016 from the President of the General Assembly addressed to the Chair of the Fifth Committee

I have the honour to transmit herewith a letter dated 30 September 2016 from the President of the United Nations Dispute Tribunal, Judge Rowan Downing, with regard to agenda item 145 (see annex).

(Signed) Peter Thomson



Annex

I have the honour to transmit unanimous observations and comments by the judges of the United Nations Dispute Tribunal in respect of some of the comments contained in the report of the Secretary-General on the findings and recommendations of the Interim Independent Assessment Panel on the system of administration of justice at the United Nations (A/71/163, dated 18 July 2016) (see enclosure).

The judges provide these observations and comments directly to the General Assembly through your office, there being no other avenue properly or appropriately available, given that to write through the Secretary-General, the only respondent in cases before the Tribunal, would be entirely inappropriate in this instance.

The judges welcome the findings and recommendations of the Interim Independent Assessment Panel. At the same time, they express concern about the persistent lack of recognition for the Tribunal's autonomy and independence on the part of some offices of the Secretariat, which is demonstrated by some of the Panel's findings, the comments contained in the report of the Secretary-General and facts and observations presented in the enclosure hereto.

The judges respectfully submit that the arrangement whereby the same offices of the Secretariat that appear before the Tribunal on behalf of the Secretary-General are vested with the power to determine important issues affecting the Tribunal and its judges' status and conditions of service has led to the misinterpretation and misapplication of General Assembly resolution 63/253 and is inconsistent with the United Nations standards on the independence of the judiciary.

The judges respectfully request the General Assembly to take appropriate steps to ensure the arrangements affecting the day-to-day work of the Tribunal and its judges' status and conditions of service in accordance with the United Nations standards on the independence of the judiciary and the judges' standing as elected officials of a subsidiary organ of the Assembly, in a manner commensurate with the dignity of their office and the burden of responsibilities.

The General Assembly is kindly requested to give consideration to the matters raised. Accordingly, I should be grateful if the present letter and its enclosure could be circulated as a document of the General Assembly, under agenda item 145.

(Signed) Rowan **Downing**
President of the United Nations
Dispute Tribunal

Enclosure

Observations and comments by the judges of the United Nations Dispute Tribunal on recommendations contained in the report of the Secretary-General on the findings and recommendations of the Interim Independent Assessment Panel on the system of administration of justice at the United Nations (A/71/163)

Introduction

1. The present document contains observations and comments by the judges of the United Nations Dispute Tribunal in respect of some of the comments contained in the report of the Secretary-General on the findings and recommendations of the Interim Independent Assessment Panel on the system of administration of justice at the United Nations (A/71/163, dated 18 July 2016), together with a number of other matters of concern.

Summary

2. The judges welcome the findings and recommendations of the Interim Independent Assessment Panel (see A/71/62 Rev.1). Concern is expressed about the persistent lack of recognition and appreciation of the autonomy and independence of the Tribunal on the part of some offices of the Secretariat, which can be seen from the Panel's findings and which are further demonstrated by comments contained in the report of the Secretary-General and facts described below that fundamentally misapply General Assembly resolution 63/253. The judges respectfully submit that there is a direct and real conflict of interest experienced through the arrangement whereby the same offices of the Secretariat that appear before the Tribunal on behalf of the Secretary-General are vested with the power to determine the status and conditions of service of the judges in the hierarchy of the governing bodies of the United Nations.

3. As such, the judges respectfully request the General Assembly to regulate their status and conditions of service in accordance with the United Nations standards on the independence of the judiciary and their standing as elected officials of a subsidiary organ of the United Nations, in a manner commensurate with the dignity of their office, as officials and not staff members, and the burden of their responsibilities.

Submissions and observations

Recommendation 1

The Office of Administration of Justice should reorganize the distribution of the offices of its respective components in New York

4. The Panel looked at the system components and recommended the relocation of the Office of Administration of Justice from the same floor as the judges of the Dispute Tribunal and the Registries of the Dispute Tribunal and the United Nations Appeal Tribunal. In paragraph 79 of the Panel's report, it is stated that there is a "perception that the Tribunals [are] under the direct authority of the Administration". The Secretary-General states in response that "this perception has

no basis in fact" (see A/71/163, para. 14). Nevertheless, even the appearance of impropriety must be avoided at all costs.

5. The judges respectfully point out that the staff of the Office of Administration of Justice, although working in an independent office, are nevertheless staff members who are subject to the direction and control of the Secretary-General, who is the respondent before the Tribunal. They advise the Secretary-General in respect of a number of matters. It is these facts that create the perception upon which the Panel has commented. The judges share the concern of the Panel and further submit that it is their actual concern that the presence of the Administration in New York immediately adjoining their chambers and the offices of the staff of the Registry assisting them impedes free deliberations and discussion of case-related matters. The judges have direct knowledge of occasions on which some stakeholders and staff members laboured under the unfortunate misapprehension that the Executive Director of the Office was "in charge" of the Tribunal and had management responsibility over the judges. This view is reinforced by the reference on the Office's website that states that "the UN Dispute Tribunal is an entity of the Office of Administration of Justice".⁴

6. The judges, moreover, note that it is most unusual for the administrative offices of any court or tribunal to be located effectively in the same space as the chambers of the judges and their staff. There is no physical separation between the Administration and the judges. This occurs in no other United Nations-established court or tribunal. In fact, most judicial chambers are separated, at the very least, by security doors to ensure that a barrier to entry into the chambers is maintained. While it is stated that the perception is not a fact, the perception, as noted above, is very important. Actual and perceived judicial independence through physical separation from the Administration is central in all justice systems.

7. In addition, it is essential that staff of the Registries not be subject to requests from the Administration, requests that are not only at the expense of time that should be devoted to cases before the Tribunal but also that could be seen as compromising the independence of the staff assisting the judiciary.

8. Furthermore, having the courtroom in New York on the 24th floor of a secure high-rise office building away from the Headquarters Building prevents ready public access to view the Tribunal proceedings. In addition, presence in the Headquarters Building would bring awareness to staff, management, delegates of Member States and members of the public of the existence of the Tribunal and permit them to observe the proceedings. Transparency would be achieved and the reality of independence and accountability demonstrated.

⁴ See the glossary reference to the Tribunal at www.un.org/en/oaj/unjs/glossary.shtml.

Recommendation 4

A clearer institutional link between the Registries and the Tribunals should be established and the status of officer of the court for United Nations staff members for as long as they serve as Registrars or staff of the Registries should be officially created (para. 173)

9. The judges welcome the recommendation and submit that there are several ways to achieve the objective of having the staff of the Registries regard themselves as working for an independent tribunal, while remaining within the confines of the Staff Rules.

10. First, there should be elimination of the dual line of reporting in the formal sense. Currently, the legal officers are the confidential assistants of the judges. They also assist the Registrar. Taking into consideration that the main task of the legal officers is to work on the procedural and substantive matter of the cases before the Tribunal, they must be subordinate to the judges, directly or hierarchically through the Registrars as the most senior legal officer in the Registry.

11. Second, the legal staff of the Tribunal should not be in a position in which they can be called upon to disclose any matter concerning the judicial work of the chambers without the express consent of a judge. Currently, under the Staff Regulations and Rules of the United Nations, they could be required to provide information if it is requested by the Administration. Failure to provide such information may make them appear uncooperative, which may be reflected in any formal appraisal of their work, as is made annually by way of the e-performance document. The judges intend to address the matter at the operational level but still deem it necessary to have this risk attenuated through structural changes.

12. Third, the judges must have meaningful input into performance evaluation decisions concerning the legal officers and the Registrars.

Recommendation 5

Judges should have a formal role in the process of selection and appointment of the Registrars and their staff, as well as in the evaluation of their performance (para. 173)

13. The comments of the Secretary-General on the Panel's findings, with respect, distort the thrust of the Panel's recommendation by focusing on the use of the word "appointment". The judges do not propose that the ultimate appointment of staff be done other than pursuant to the established rules.

14. They nevertheless respectfully submit that selection of staff has been done involving judges in all international and hybrid tribunals, which is squarely consistent with the Charter of the United Nations. This involvement may vary depending on seniority and/or the actual significance of the post concerned. It needs to be stressed, however, that legal officers of United Nations courts and tribunals are staff members with very specific functions and obligations for which they must demonstrate proficiency. Therefore, the input of the judges when evaluating candidates is of paramount importance.

15. A potential problem of recusal in a dispute before the Tribunal involving staff members of internal justice institutions will arise independently of whether the staff

member was selected with or without the participation of the judges because it is inherent to the position of all staff employed by the internal justice institutions, and a rejected contender will, likewise, question the selection of the person actually selected. Statistically, the risk of such a dispute is very low and, practically speaking, the issue could be resolved by sending the case to another seat (duty station) of the Tribunal. Thus, the argument put forth in the response of the Secretary-General to the Panel is lacking in any practical legal basis.

Recommendation 6

The functions of the Principal Registrar in support of the Tribunals should be further clarified (para. 175)

16. The judges concur that the function of the Principal Registrar set out in section 4 of the Secretary-General's bulletin on the organization and terms of reference of the Office of Administration of Justice (ST/SGB/2010/3) is unclear. It is noted that section 4.3 (a) of the bulletin expressly provides a role for the Principal Registrar in respect of "enforcing compliance with the rules of procedure of the Tribunals by the parties". It is inconceivable that the Administration should have considered it appropriate to include such a provision, given that it is clearly a judicial function. There is no envisaged implementation of this provision, in any event. In addition, there is a direct conflict because there is a reference to such enforcement being at both the Dispute Tribunal and Appeals Tribunal levels. Furthermore, in section 4.3 (b) of the bulletin, the Principal Registrar is to have the function of "coordinating and monitoring the maintenance of the Tribunals' registers". The Principal Registrar cannot, without conflict, have direct access to the registers of both the Dispute Tribunal and the Appeals Tribunal.

Recommendation 7

The legal status of the judges of the Tribunals has to be further clarified:

- (a) The emoluments and conditions of service of the Dispute Tribunal judges should be established specifically for them and not by reference to the D-2 level;*
- (b) It should be clearly specified that the only "rank" that the judges of the Tribunals possess is that of a judge of the internal judicial system of the United Nations;*
- (c) The judges of the Appeals Tribunal should be recognized as officials other than Secretariat officials and should be granted the privileges and immunities currently enjoyed by the Dispute Tribunal judges under article V, section 18, of the Convention on the Privileges and Immunities of the United Nations (para. 180)*

17. The Secretary-General notes that "the Panel took the view that the independence of the judiciary was linked to the issue of their status" (see A/71/163, para. 23).

18. The judges respectfully point out that it is not only the Panel's view but also a fundamental international standard that the independence of the judiciary is linked to the manner in which the status of the judiciary is defined and administered. In particular, the Basic Principles on the Independence of the Judiciary provide in principle 11 that "the term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law". The attendant Procedures for the Effective

Implementation of the Basic Principles on the Independence of the Judiciary, endorsed by the General Assembly, in procedure 5 mandate "offering judges appropriate personal security, remuneration and emoluments".

19. The Council of Europe, in its recommendation No. R (94) 12, under principle I, "General principles on independence of judges", provides that "the terms of office of judges and their remuneration should be guaranteed by law". Under principle III, "Proper working conditions", it requires "ensuring that the status and remuneration of judges is commensurate with the dignity of their profession and burden of responsibilities".

20. In the same vein, the standard is expressed by civil society in principle 4.1 of the Burgh House Principles on the Independence of the International Judiciary, stating that "judges' essential conditions of service shall be enumerated in legally binding instruments". In principle 4.2, it is stated that "no adverse changes shall be introduced with regard to judges' remuneration and other essential conditions of service during their terms of office". Likewise, the Universal Charter of the Judge provides as follows in article 13: "The judge must receive sufficient remuneration to secure true economic independence. The remuneration ... must not be reduced during his or her judicial service."

21. In more express terms, the draft Universal Declaration on the Independence of Justice, prepared under the auspices of the Economic and Social Council and recommended by the Commission on Human Rights as a tool for the implementation of the Basic Principles on the Independence of the Judiciary, provides as follows:

Tenure

16. (a) The term of office of the judges, their independence, security, adequate remuneration and conditions of service shall be secured by law and shall not be altered to their disadvantage.

22. As a corollary to the principle of independence, as concluded by the International Commission of Jurists with regard to a review of international jurisprudence, "it is crucial that judges are not subordinated hierarchically to the executive or legislative, nor that they are civil employees of these two powers".^b

23. The judges submit that their status, including remuneration, is not sufficiently "secured by law", that is, in this case, the resolutions of the General Assembly. As such, their status and remuneration are exposed to unilateral interpretations by the Office of Human Resources Management. These interpretations, as a rule, disclose a lack of understanding of the judges' separate status, seeking to treat them as civil staff employees of the Secretariat, are to their disadvantage and are often made in an arbitrary manner in breach of the applicable administrative issuances.

24. The judges are certainly not staff of the Secretariat nor members of an "entity" of the Office of Administration of Justice. They are not under or within the

^b International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors: A Practitioner's Guide* (Geneva, 2007), p. 25. This cites cases before the European Court of Human Rights, the Working Group on Arbitrary Detention and the Inter-American Commission on Human Rights.

contemplation of the International Civil Service Commission. As noted above, the judges are elected officials of a subsidiary organ of the General Assembly.^c As recognized by the Secretary-General in paragraph 24 of his report, "judges are paid by reference salaries at the D-2 level" and "such reference merely defines the salary amount, not the legal status of the judges". This statement has been directly contradicted by statements originating from the Office of Human Resources Management, which claimed that "conditions of service for the UNDT Judges [are] equivalent to staff members at the D-2 level" and "they will be subject to the provisions of the Staff Regulations and Staff Rules and relevant administrative issuances, together with such amendments as may from time to time be made to such Staff Regulations and Staff Rules and administrative issuances".^d The judges find this to be in violation of United Nations standards on the independence of the judiciary, their status as elected officials of a subsidiary organ of the Assembly and a fundamental misrepresentation of Assembly resolution 63/253.

25. The judges recall that in its resolution 63/253 the General Assembly specifically lists those provisions of the Staff Rules that are to be applied to them. Nevertheless, the Staff Rules are improperly applied to them, for example:

- Staff assessment applicable to staff has been levied upon judges' salaries, which has no basis in the General Assembly resolution, nor could it be otherwise justified. The judges understand that no staff assessment deductions apply to the other judges in the United Nations system, those being the judges of the International Court of Justice, the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994 (now the International Residual Mechanism for Criminal Tribunals) and the hybrid courts established through the United Nations — the Special Tribunal for Lebanon and the Extraordinary Chambers in the Courts of Cambodia (through the United Nations Assistance to the Khmer Rouge Trials). The comparison made by the Secretary-General with the Chair of the Advisory Committee on Administrative and Budgetary Questions and the inspectors of the Joint Inspection Unit is not applicable. Those people are not judges. They carry out an independent function directly for the General Assembly. The only similarity with judges is that they, just as the judges of the Dispute Tribunal, the Appeals Tribunal, the International Court of Justice, the International Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda (now the Residual Mechanism), the Special Tribunal and the Extraordinary Chambers, have immunities as non-Secretariat officials of the United Nations.
- On the occasion of the newly elected Tribunal judges taking office in July 2016, the Office of Human Resources Management first purported to issue

^c See www.un.org/en/ga/about/subsidiary/other.shtml.

^d As set out in the new judges' purported "letters of appointment" of June 2016.

"appointment letters" as though the judges were staff members. Moreover, such letters purported to unilaterally decrease the judges' emoluments as though they were staff members and introduce a clause subordinating the judges to all present and future staff rules and regulations. The judges refused to accept the provisions. It is submitted that, in accordance with the "remuneration adequately secured by law" principle, the reference to the D-2, step IV, level as defining the salary amount must not be taken to allow any further extension of staff rules and regulations. In addition, as cited above, it is an international standard that judges' remuneration not be decreased during their term of office.

- It is noted that, when the application of a staff rule would act to the judges' advantage, the Office of Human Resources Management refused its application. It, for example, refused to grant an incremental step increase, arguing that the judges' salaries were established at a flat rate.
- The judges note that their status is not respected with regard to official travel. The Tribunal, being the successor of the United Nations Administrative Tribunal and a subsidiary organ of the General Assembly, is covered by the Secretary-General's bulletin on rules governing payment of travel expenses and subsistence allowances in respect of members of organs or subsidiary organs of the United Nations (ST/SGB/107 Rev.6). Moreover, in section 1.2 of administrative instruction ST/AI/2013/3 on official travel, it is made clear that the Secretary-General's bulletin is applicable in its stead. Nevertheless, the Office of Human Resources Management applied daily subsistence allowance and travel status applicable to staff of a rank lower than D-2, thereby depriving the judges of their due entitlements. The Office has advised the judges that it regards the Secretary-General's bulletin as outdated and no longer applicable. This is an arbitrary act and improper. It is also to be noted that the Office even denied the judges the payment of daily subsistence allowance due to D-2-level officials other than staff members under section 4.2 of administrative instruction ST/AI/2014/2 on the system of daily subsistence allowance.
- With some variations among the headquarters locations, the judges have been reflected in Umoja as staff members and made to wear "staff" grounds passes. These administrative arrangements are inaccurate and inappropriate external manifestations of a status of civil employees of the Secretariat, which undermines trust in their independence and impartiality. The automatic application of the Staff Rules in Umoja, moreover, causes confusion as to the judges' entitlements.
- The half-time judges, notwithstanding that they are specifically noted as being eligible for a pension, with a deduction being made from their emoluments in respect of such, are at real risk of being regarded as not having contributed for the vesting period of five years and are thus likely to be excluded from receipt of a pension, given that the intention of the General Assembly appears not to have been implemented. Their period of engagement may be counted as three and a half years. Their emoluments have the pension contribution deducted therefrom. The purported entitlement as provided may be thus entirely illusory, owing to the application of the regulations and rules of the United Nations

Joint Staff Pension Fund (art. 31 (b) (i)), without consideration of the rights expressly given to the half-time judges by the Assembly.

- The full-time judges receive only the pension accruing as though they were staff members. Their position is not comparable with other judges in the United Nations system, where a full pension is payable at the conclusion of the term of appointment, recognizing their service and limited appointments.

26. The judges respectfully submit that it follows from the principle that remuneration and conditions of service be "adequately secured by law" that their salaries and emoluments must be defined in clear and definite terms and not by blanket reference to the Organization's rules and regulations wherein the Administration acts as delegated legislator and ultimate interpreter. It is submitted that, when it comes to interpreting their salaries and emoluments, the importance of the principle "adequately secured by law" is even more significant given that the Administration has a direct conflict of interest in this particular case. It arises, first, in the aspect of competing for the funds within the same budget of the Secretariat; second, it is obvious that the same legal personnel of the Office of Human Resources Management who defend the position of the respondent in cases before the Tribunal are called upon to take decisions on the judges' remuneration. This situation contradicts the postulate that the status of judges be "commensurate with the dignity of their profession and burden of responsibilities".

27. Another conflict of interest arises on the part of the judges who, when subjected to the Staff Rules regime, as augmented, modified and interpreted by the Office of Human Resources Management, are exposed to the risk of disputing these rules and interpretations in their own cases and taking positions that will then compromise their impartiality in all similar disputes. It is submitted that the judges are, by international standards, bound to refrain from expressing views that might reasonably be expected to affect the outcome of the pending and potential proceedings, as well as recuse themselves from any case in which it may appear that they are unable to decide on the matter impartially. See, for example, value 2, "Impartiality", of the Bangalore Principles of Judicial Conduct (E/CN.4/2003/65) and the code of conduct for the judges of the Dispute Tribunal and the Appeals Tribunal, as approved by the General Assembly in its resolution 66/106.

28. The judges therefore respectfully request the General Assembly, as a matter of great importance, to regulate salaries and emoluments so as to guarantee them in clear and certain terms by eliminating the ability to interpret these terms by the Office of Human Resources Management and to protect impartiality by insulating the judges, to the extent possible, from interacting with the Office.

29. The judges further submit that, whereas their emoluments have been subjected to burdens applicable to staff, they themselves do not enjoy the benefits applicable to staff. As such, even by comparison with staff at the D-2, step 4, level, their remuneration is not at an appropriate level. The judges recall that, unlike staff members, they have no prospect of extension of their term of service or of promotion, receive no incremental step increases and do not benefit from mobility. Their conditions of service are substantially less than those of all other actors who interact directly with the Tribunal, such as the Executive Director of the Office of

Administration of Justice, the Assistant Secretary-General for Human Resources Management and the Assistant Secretary-General and United Nations Ombudsman.

30. In concrete terms, the judges would respectfully request the General Assembly to consider that they cumulatively represent only seven full-time posts, disposing of an ever-growing case load, now rising to 306 cases disposed of in the past year to 31 August 2016 and 364 pending cases as at 9 September 2016. The expense of ensuring that they have a proper status will have no bearing on the overall expenses of the Secretariat and its more than 44,000 staff within the jurisdiction of the Tribunal. Accordingly, the judges respectfully request the Assembly to endorse the following considerations for amending the statute of the Tribunal, aimed at bringing their emoluments and conditions of service into line with international standards:

- (a) Emoluments defined in clear, finite and unambiguous terms;
- (b) Salary at the Assistant Secretary-General level, pursuant to the original proposal by the Redesign Panel on the United Nations system of administration of justice;
- (c) Abolishment of staff assessment in respect of their emoluments;
- (d) Maintenance of emoluments and prevention of any degradation of conditions during their term of office;
- (e) Incremental step increases;
- (f) Confirmation of the accrual of the separation grant;
- (g) Pensions for full-time judges commensurate with those received by the judges of other United Nations tribunals after the period of their appointment;
- (h) Vested pensions for half-time judges after seven years of service.

Recommendation 8

Both Tribunals should submit their annual reports directly to the General Assembly and their Presidents should be invited to present them to the Assembly (para. 183)

31. The judges respectfully agree that the issue of direct reporting to the General Assembly is for it to determine. They believe, however, that the recommendation reflects their views, given that the placement of an intermediary between the judiciary and the legislative body is unusual and unwarranted. It is not consistent with the International Court of Justice, the International Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda (now the Residual Mechanism) and the Special Tribunal for Lebanon, which report directly.

Recommendation 14

Provision should be made for knowledge of human rights law and international law in the criteria for appointment of judges, with proven practical experience in administrative law and criminal justice and relevant institutional knowledge being desirable. Due diligence should be exercised in the recruitment process (para. 210)

32. The Secretary-General refers in paragraph 41 of his report to adding "fluency in either English or French to the qualifications of Dispute Tribunal judges".

33. While English and French are the working languages of the Tribunal, it is to be noted that systemic diversity is important and that a requirement of fluency in either language may lead to the exclusion of available candidates. The judges respectfully suggest that knowledge of either language, with an ability and preparedness to gain fluency in the other, may be a more appropriate requirement.

Recommendation 15

There should be a better induction process for judges before they assume their duties (para. 211)

34. The judges support the views of the Secretary-General regarding the induction process for judges before the assumption of their duties.

Recommendation 50

The term of the President of the Dispute Tribunal should be extended to a longer period, for example three and a half years (para. 371)

35. The judges note and support the comments of the Secretary-General in reference to the recommendation to extend the term of the President of the Tribunal. The considerable work involved in the presidency for both the President and the Registry at which he or she is located is such that a one-year term is appropriate owing to the impact on the work of both the judge and the staff of the Registry. Special post allowance should be payable to the President and the Registrar at the seat of the Tribunal at which the President is located during the term of office. Furthermore, the President should remain in office for one year to give more judges the opportunity to serve as President, thereby increasing the geographical diversity of the presidency. The period of appointment should begin on 1 January each year to better align with the United Nations calendar.